



STATE OF CONNECTICUT

OFFICE OF STATE ETHICS

Draft Declaratory Ruling 2014-A

April 11, 2014

Questions Presented: (1) May the Director of the Liquor Control Division (“Division”), an arm of the Liquor Control Commission (“Commission”), act on matters brought before the Division or Commission by the law firm that employs his spouse, if the spouse is not involved in those matters, is not compensated based on those matters, and has no equity interest in the firm? (2) May the Director’s spouse continue to represent clients seeking liquor permit applications before the Division or Commission, if the Director recuses himself and the matters are assigned to someone at or above his level?

Brief Answers: (1) The Director may act on such matters because his spouse will not benefit monetarily from his actions and the law firm is not a “business with which he is associated.” (2) The Director’s spouse may, with the caveats discussed below, continue to represent clients before the Division or Commission.

At its March 2014 regular meeting, the Citizen’s Ethics Advisory Board (“Board”) granted the petition for a declaratory ruling

submitted by Jamie T. Cowdery, Esq., of Cowdery, Ecker & Murphy, LLC, and the Board now issues this ruling under § 1-92-39b of the Regulations of Connecticut State Agencies.

Facts

The following facts, as set forth by the petitioner, are relevant to our opinion:

For more than 15 years, [Carmody Torrance Sandak & Hennessey, LLP (“Firm”)] has represented a trade association of wholesalers licensed by the Department of Consumer Protection, as well as the trade association’s individual member wholesalers, in matters before the Division and Commission. In more recent years, the Firm’s representation of clients before the Division and Commission has expanded to other licensed wholesalers, manufacturers, out of state shippers and retailers, as well as applicants for such licenses (collectively “Legacy Liquor Clients”). Two partners of the firm have historically handled virtually all of the Firm’s matters for its Legacy Liquor Clients involving the Division and Commission, and they have frequent and regular direct interactions with the [Division] Director.

The Firm’s interactions with the Director have generally consisted of: reporting industry and regulatory concerns and seeking assistance and involvement in resolving these concerns; seeking and advocating for formal and informal regulatory and policy interpretations; vetting permit applications and business/operating proposals to ensure regulatory compliance; cooperating with Liquor Control agents under the Director’s supervision in connection with trade practice investigations; and discussing and exploring with the Director potential “offers in compromise” that may be accepted by the Commission to resolve these investigations.

The Firm also applies on behalf of its clients for permits, participates in formal and informal hearings before the Commission, and petitions for declaratory

rulings from the Department of Consumer Protection (“Department”). While the Director does not have decision making authority on these particular matters, he may provide relevant input and assistance to the Commission and the Department.

Pursuant to an agreement between Carmody & Torrance and Sandak Hennessey & Greco, LLP (“SH&G”), SH&G’s partners, associates and staff joined the Firm effective January 1, 2014 (resulting in the Firm changing its name to Carmody Torrance Sandak & Hennessey LLP). The Director’s spouse was an equity partner at SH&G and joined the Firm as an equity partner.

In December 2013 the Firm sought an informal opinion from the Office of State Ethics (“OSE”) concerning its ability to continue to directly interact with the Director . . . on behalf of existing clients given the spouse’s impending equity interest in the Firm. OSE issued the informal opinion attached as Exhibit A in response to this request. In the informal opinion, the [OSE] Legal Division . . . concluded that the Director would be required to recuse himself from any involvement in matters brought before the Department by the Firm because the Firm would be considered a “business with which he is associated” under the State Code of Ethics.

In order to permit the Firm to continue its interactions with the Director, the Director’s spouse has graciously agreed to forgo her equity interest in the Firm and become a contract employee of the Firm. Therefore, the Firm proposes to enter into an employee-employer relationship with the Director’s spouse under which she would be compensated as a contract partner on a W-2 basis; her compensation would be salary plus performance-based compensation that will in no way be connected with the Firm’s performance of services for Legacy Liquor Clients. Although retaining the title of “partner” she would have no ownership or equity interest in the Firm.

In addition . . . the Firm proposes to isolate [the Director's spouse] from any participation in matters involving the representation of any Legacy Liquor Clients before the Division and Commission. Thus, the spouse (1) would have no public or private involvement in working on such matters, (2) would not discuss such matters with anyone in the Firm, and (3) would not share in the fees derived from such matters or otherwise be compensated based on them. . . .

In connection with her practice as a planning and zoning attorney the Director's spouse occasionally represents clients pursuing liquor permit applications before the Division and the Commission. In accordance with a September 23, 2002 State Ethics Commission opinion, in matters brought before the Division by the Spouse, the Director recuses himself . . . and the matter is assigned to someone at or above the Director's level.

The Firm proposes to continue this recusal process in those occasional matters brought before the Division or Commission by the spouse, but to be allowed to continue to deal directly with the Director on matters brought before the Division or Commission on behalf of the Firm's Legacy Liquor Clients by attorneys other than the spouse.

Analysis

1. Matters brought before the Division or Commission on behalf of the Firm's Legacy Liquor Clients by attorneys other than the Director's spouse.

The first question is whether the Director may act on matters brought before the Division or Commission on behalf of the Firm's Legacy Liquor Clients by attorneys other than his spouse.

The former State Ethics Commission ("former Commission") addressed a similar scenario in Advisory Opinion No. 2004-11.¹ There, a Commissioner of the Public Utility Control Authority

¹Connecticut Law Journal, Vol. 66, No. 4, p. 15E (July 27, 2004).

(“Authority”)—whose role was to hear and decide matters concerning public service companies—asked this question: How does the Code of Ethics for Public Officials² (“Ethics Code”) apply “to her when her husband’s law firm . . . files an appearance in a matter pending before the Authority”?³ She explained that her husband was not involved with the firm’s utility practice; that his compensation was not impacted by the profitability of the firm’s utility practice; and that, as an associate, he received a base salary and a longevity- and performance-based bonus.⁴

Given those facts, the former Commission looked to General Statutes §§ 1-85 and 1-86 (a). Under the former, a public official or state employee generally has a substantial conflict—and may not act—“if he has reason to believe or expect that . . . his *spouse . . . or a business with which he is associated* will derive a direct monetary gain or suffer a direct monetary loss . . . by reason of his official activity.”⁵ And under the latter, the official or employee generally has a potential conflict—and may not act⁶—if he “would be required to take an action that would affect a financial interest of . . . [*his*] *spouse . . . or a business with which . . . [he] is associated . . .*”⁷ Both provisions use the term “business with which he is associated,” which General Statutes § 1-79 (2) defines, in part, as

any . . . entity through which business for profit . . . is conducted in which the public official or state employee *or member of his or her immediate family* is a director, officer, owner, limited or general partner, beneficiary of a trust or holder of stock constituting five per cent or more of the total outstanding stock of

²Chapter 10, part I, of the General Statutes.

³Connecticut Law Journal, Vol. 66, No. 4, *supra*, p. 15E.

⁴*Id.*

⁵(Emphasis added.) General Statutes § 1-85.

⁶In the case of a potential conflict (as opposed to a substantial conflict, which always requires recusal), “members of a state regulatory agency” may act under certain circumstances. See General Statutes § 1-86 (a). They include “member[s] of any commission, board, council, authority or other similar body which is authorized by law to regulate, i.e., control, administer, or oversee, any profession, occupation, industry, activity, fund, endeavor or area of conduct.” Regs., Conn. State Agencies § 1-81-30 (c). The Director does not fit within that definition and thus may not act in the case of a potential conflict.

⁷(Emphasis added.) General Statutes § 1-86 (a).

any class⁸

Applying those provisions to the facts before it, the former Commission determined that the Commissioner had neither a substantial nor a potential conflict, for two reasons: First, even if the Commissioner were to act on a matter in which the law firm had filed an appearance, her spouse would not benefit monetarily.⁹ Second, even if, under such circumstances, there would be a monetary benefit to the law firm, the firm was not, in relation to the Commissioner, a “business with which [s]he is associated”—because, noted the former Commission, that term does not “encompass the employer of an immediate family member”¹⁰ Thus, the former Commission concluded that the Ethics Code would not “prevent the Commissioner from hearing matters in which [the law firm] has filed an appearance.”¹¹

Like the Commissioner’s spouse there, the Director’s spouse here has no equity interest in the Firm, and receives a salary and a performance-based bonus having nothing to do with the Firm’s performance of services for its Legacy Liquor Clients. Even if, then, the Director acts on matters brought before the Division or Commission on behalf of the Firm’s Legacy Liquor Clients, his spouse will not benefit monetarily. But unlike the Commissioner’s spouse there, the Director’s spouse here is not an associate, but rather a contract (or non-equity) partner, and the question is this: Does this “partner” title make the Firm, in relation to the Director, a “business with which he is associated,” given that § 1-79 (2) defines it to include a for-profit entity in which a state employee’s immediate family member is a “limited or general *partner*”¹²

The Ethics Code does not define what it means to be a “limited or general partner” under § 1-79 (2), nor does it suggest “that the legislature intended to assign to the [terms] anything other than [their] ordinary meaning[s]. Accordingly, in the absence of other statutory guidance, we may appropriately look to the meaning[s] of

⁸(Emphasis added.)

⁹Connecticut Law Journal, Vol. 66, No. 4, *supra*, p. 16E.

¹⁰*Id.*; see also Advisory Opinion No. 2000-8, Connecticut Law Journal, Vol. 61, No. 38, p. 10D (March 21, 2000).

¹¹*Id.*

¹²(Emphasis added.)

the [terms] as commonly expressed in the . . . dictionaries.”¹³ Black’s Law Dictionary defines “limited partner” as “[a] partner *who receives profits* from the business but does not take part in managing the business and is not liable for any amount greater than his or her original investment.”¹⁴ And it defines “general partner” as “[a] partner who ordinarily takes part in the daily operations of the business, *shares in the profits* and losses, and is personally responsible for the partnership’s debts and liabilities.”¹⁵ Thus, to be either a “limited or general partner” under § 1-79 (2), a partner must receive or share in the partnership’s profits.

Here, because the Director’s spouse—as a contract partner—does not receive or share in the Firm’s profits, the Firm is not, in relation to the Director, a “business with which he is associated” under § 1-79 (2). That, combined with the already noted fact that the Director’s spouse will not benefit monetarily if the Director acts on matters brought before the Division or Commission on behalf of the Firm’s Legacy Liquor Clients, leads us to conclude as follows: The Director may act on matters brought before the Division or Commission on behalf of the Firm’s Legacy Liquor Clients by attorneys other than his spouse, without violating §§ 1-85 and 1-86 (a).

2. Matters brought before the Division or Commission by the Director’s spouse.

The next question is whether the Director’s spouse may continue to represent clients seeking liquor permit applications before the Division or Commission, if the Director recuses himself and the matter is assigned to someone at or above his level.

As noted in the “Facts” section, after the Director was hired in 2002, the former Commission was asked how the Ethics Code applies to him given that “his spouse is an attorney who regularly represents liquor applicants and permittees before the Department and the Commission.”¹⁶ Reluctant to apply General Statutes § 1-84

¹³*State v. Woods*, 234 Conn. 301, 309 (1995).

¹⁴(Emphasis added.) Black’s Law Dictionary (8th Ed. 1999).

¹⁵(Emphasis added.) *Id.*

¹⁶(Internal quotation marks omitted.) Request for Advisory Opinion No. 3122 (2002).

(c)¹⁷—the use-of-office provision—“in such a way as to prohibit a spouse from conducting a pre-existing law practice,” the former Commission concluded, in an informal staff letter, that the spouse could continue this practice, with three caveats: First, if a client of the Director’s spouse is involved before the Division, the Director must, under § 1-86 (a), disclose the potential conflict in writing to his superior, who must assign the matter to someone at or above the Director’s level; second, the Director must refrain from acting “with regard to a case that raises clearly analogous issues to one of his spouse’s cases”; and third, “the number of cases of representation by the spouse before [the Division] should remain relatively constant,” as “[a]ny significant increase would indicate a use of office”¹⁸

Although these caveats address most of our concerns about the spouse’s practice before the Division or Commission, we add one more. It stems from Advisory Opinion No. 90-10, which involved the Administrator of the Technical Services Division of the Connecticut Housing Finance Authority (“CHFA”), whose job was to supervise and direct “fifteen subordinate staff members in three related [CHFA] program areas.”¹⁹ She asked whether her husband could serve as a “consultant with any individual or firm that is, or contemplates, doing business with CHFA.”²⁰

Of particular concern to the former Commission was whether the spouse’s consulting work would interfere with the Administrator’s ability to perform her CHFA duties. Of course, the former Commission noted, the Administrator would be required to abstain from “any matter involving an individual or firm for whom [her husband] was providing consulting services,” and the matter would have to be “assigned to a peer or superior, not to a subordinate employee.”²¹ But also, it continued, the Administrator would be

¹⁷Section 1-84 (c) provides: “No public official or state employee shall wilfully and knowingly disclose, for financial gain, to any other person, confidential information acquired by him in the course of and by reason of his official duties or employment and no public official or state employee shall use his public office or position or any confidential information received through his holding such public office or position to obtain financial gain for himself, his spouse, child, child’s spouse, parent, brother or sister or a business with which he is associated.”

¹⁸Request for Advisory Opinion No. 3122, *supra*.

¹⁹Connecticut Law Journal, Vol. 51, No. 41, p. 4C (April 10, 1990).

²⁰*Id.*, p. 5C.

²¹*Id.*, p. 6C

required to “abstain from acting . . . on matters affecting those in competition with the spouse.”²² “In short,” the former Commission concluded, “unless CHFA can ensure that [the Administrator] will be insulated from taking all such actions and will still be capable of performing her state duties, [her husband] should not” engage in the proposed consulting work.²³

The same is true here, and we conclude therefore that the Director’s spouse may continue to represent a “relatively constant” stream of clients before the Division or Commission to the extent that the Department of Consumer Protection can ensure that the Director’s recusals (as mandated by this opinion) are not so frequent as to render him incapable of performing his state duties.

Conclusion

We conclude, based on our analysis, that (1) the Director may act on matters brought before the Division or Commission on behalf of the Firm’s Legacy Liquor Clients by attorneys other than his spouse, and that (2) the Director’s spouse may, with the caveats discussed above, continue to represent clients before the Division or Commission.

By order of the Board,

Dated _____

Chairperson

²²Id.

²³Id.